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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 940

L. LLOYD CROSBY,

Petitioner,

v.

THE BRADSTREET COMPANY, and
S. STEWART CROSBY,

Respondents.

PETITIONER'S REPLY ON PETITION FOR CERTIORARI

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INDEX

	PAGE
Respondents do not defend the Court of Appeals' reasons for reversal	1
The critical question	2
Respondents' legalistic arguments are without merit	3
Petitioner has status	3

CASES CITED

Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371	3
Wolf v. Gold, 9 App. Div. 2nd 257; on appeal, 238 N.Y.S. 2d 743, not officially reported	3

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PETITIONER'S REPLY

Respondents do not defend the Court of Appeals' reasons for reversal

Neither Bradstreet's nor S. Stewart Crosby's brief even attempts to support the reason given by the Court of Appeals for its decision, i.e., that the underlying decree was void because in violation of the First Amendment. It is plain, therefore, that both Respondents are satisfied that the Court of Appeals' opinion cannot be defended. Just as, in the District Court, neither Respondent asserted that the First Amendment required that the underlying decree be vacated, and, yet, in the Court of Appeals, for the first time, became opportunistic defenders of the Constitution, so, now, Respondents, having convinced the Court of Appeals that the First Amendment required a reversal, recognize that said contention is untenable, and, in this court, try a new tack. For, in this court, they assert that the decree made in the District Court was without "jurisdiction", and a "monstrosity".

Opportunism thus runs riot!

A Court of Appeals opinion which both Respondents shun, must be and is basically wrong. Its infirmity may

not be glossed over by semantics, i.e., in terms of "jurisdiction" rather than of constitutional invalidity. There was jurisdiction, and there was no constitutional invalidity.

The critical question

The result is, that notwithstanding this court's oft-repeated caveat that denial of certiorari does not necessarily indicate approval of the decision below—if certiorari be denied, and the Court of Appeals' determination be permitted to stand—its opinion will be deemed to promulgate the principle that litigants may not waive the First Amendment, but may opportunistically play fast and loose, as occasion may indicate to be expedient, even if the calculated effect be to work inequity and perpetrate fraud.

Whether such result should be tolerated, is the critical question, in an area in which only this Court may speak so that all may know.

Under such circumstances—though, as we have shown, there is indisputable conflict between the decision at bar, and others made in the Circuits and by this Court—the issue is more fundamental than whether a particular controversy merits review. It is as to whether a decision, unquestionably erroneous, and potentially capable of spawning untold litigations, predicated on its misapprehension of fundamental concepts of constitutional law—i.e., that the protections of the Constitution may be invoked, but may not be abused—should be permitted to stand and to mislead all those who will undoubtedly mistake it for a beacon to guide them.

The discretionary jurisdiction of this Court to correct error, is not arbitrarily compartmented or inflexibly contained within unyielding categories—as if the clock had been turned back, and a modern counterpart of rigid common-law forms of action had returned to plague us. Litigants should not be permitted to prevail on one ground, touching the Constitution and its application, and avoid review by this Court by disowning the very reason which they persuaded the Court of Appeals was applicable.

It is enough that, with respect to the Constitution, an erroneous decision has been made by a high court, which decision, if not corrected, will serve to confound and confuse.

Respondents' legalistic arguments are without merit

The legalistic arguments by which Respondents seek to evade acknowledgment of the real issue, are all anticipated in our Petition and shown to be without merit:

There was jurisdiction to make the underlying decree, *Chicot County Drainage District* v. *Baxter State Bank* (308 U. S. 371; our Petition, p. 10), permits of no doubt on that score.

There are circumstances, under New York Law, which is applicable in diversity cases, under which an injunction may issue to prevent a libel (*Wolf* v. *Gold*, 9 App. Div. 2nd 257*, and other cases cited at pp. 9-10 of our Petition).

Nor will equity tolerate "the doing of harm malevolently" (our Petition, p. 13, and cases there cited), *a fortiori*, where the objective, as here, was and is to perpetrate equitable fraud!

Petitioner has status

Nor is there any substance to Respondent S. Stewart Crosby's attempt to show that Petitioner, L. Lloyd Crosby is without standing to protect the decree which he procured and by which he is bound (our Petition, pp. 13-14). The distinctions attempted of our authorities are without substance (Respondent S. Stewart Crosby's brief, pp. 7-8). No issue is here presented, as there was in said cases, as to *whether* L. Lloyd Crosby was in control of the litigation (his brief, p. 7). He undoubtedly was. In his petition in the District Court, Respondent *S. Stewart Crosby so admits*:

> "4. According to petitioner's [S. Stewart Crosby's] present recollection, the action was brought at the instance of petitioner's brother L. Lloyd Crosby and the above disposition thereof was arranged by Mr. Davis

* The same principle was sustained after trial (*Wolf* v. *Gold*, 238 N.Y.S. 2nd 473—not yet officially reported).

also at the instance of petitioner's said brother." (Par. 4 of S. Stewart Crosby's petition in District Court, Appdx. 10a)

L. Lloyd Crosby's sponsorship of and participation in the litigation was open and manifest. As put by this court, his was, indeed, "the laboring oar". So much so that he was explicitly included within the ambit of the underlying decree.

It is, therefore, submitted that the Court of Appeals' decision, which Respondents are unable to defend, and which, after thirty years, actually reverses the underlying decree—not for lack of jurisdiction, but by reason of a different evaluation of what relief should have been granted—and does so with inequitable consequences—should not be permitted to stand.

Opportunistic and shifting arguments, made by Respondents as they move from court to court, should not prevail.

It is respectfully prayed that certiorari be granted.

Dated, April 12, 1963.

Respectfully submitted.

JAY LEO ROTHSCHILD,
Counsel for Petitioner.